SUPREME COURT, U. S.

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No. 1159

In the Supreme Court of the United States

OCTOBER TERM, 1965

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

SCENIC HUDSON PRESERVATION CONFERENCE, TOWN OF CORTLANDT, TOWN OF PUTNAM VALLEY, TOWN OF YORKTOWN, AND FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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The undersigned respondents, Scenic Hudson Preservation Conference, Town of Putnam Valley, and Town of Yorktown, submit this memorandum in support of the petition for certiorari, but upon grounds other those asserted in the petition. They take the position that the decision of the Court of Appeals below was sound and should be affirmed, but that it deserves to be reviewed by this Court for two reasons: (1) because the treatment of the opinion below contained in the Federal Power Commission's Memorandum, explaining to this Court why the Commission has decided not to seek review, warrants a strong affirmance by this Court of the rationale of that opinion, lest the Commission misapply the opinion in the remanded hearings directed by the Court of Appeals; (2) because the main point urged by the Petitioner, namely, an

alleged conflict between certain provisions of the Administrative Procedure Act and the Federal Power Act as construed by the Court of Appeals, has wide importance and, unless disposed of on review, is likely to lead to litigation in other licensing cases.

(1)

In setting aside the license granted by the Federal Power Commission to Consolidated Edison, the Court of Appeals said:

> "The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and the absence of reasonable alternatives." (Pet. App. 32a).

The Court held that the Commission could not rest its determination on an incomplete record, but, on the contrary, was under "an affirmative duty", which it had not performed, to seek answers on its own initiative to questions calling for examination under Section 10(a) of the Federal Power Act. (Pet. App. 23a).

The same fundamental issue—"the right of the public [to] . . . receive active and affirmative protection at the hands of the Commission", as the Court of Appeals described it (Pet. App. 23a)—was the basic legal issue before the Commission when it granted the Consolidated Edison license in March of 1965. Commissioner Ross stated in his dissent (Pet. App. 22a-23a):

> "The thread running through this case has been that the applicant is entitled to a license upon making a prima facie case. My own personal regulatory philosophy compels me to reject this approach. This Commission of its own motion should always seek

> to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in a manner not possible for the uninformed and poorly financed public."

This same contention, when thereafter presented by Scenic Hudson Preservation Conference and the Towns of Cortlandt, Putnam Valley and Yorktown in their brief to the Court of Appeals, was belittled in the Commission's brief as a "pervasive position" resting on "unarticulated and unanalyzed" assumptions which were "totally unwarranted":

> ". . . when the case is stripped of the false premises and emotional aura in which petitioners' adroit brief would clothe it, we are left with a simple case in which the Commission has performed the plain duty for which Congress created it—it has exercised its administrative discretion and judgment reasonably, in accordance with its statutory authority, and in an orderly proceeding that conformed not only to prescribed procedures but also to the basic principles of due process, fairness, and full inquiry." (Commission Brief in Court of Appeals, p. 19)

> ". . . having intervened as parties and having had ample opportunity to support their contention, petitioners cannot impose an affirmative burden on the Commission to secure evidence which it has no reason to suppose would be helpful in passing on the application." (Commission Brief in Court of Appeals, p. 35)

Told by the Court of Appeals that the Commission's role as "representative of the public interest . . . does not permit it to act as umpire blandly calling balls and strikes

for adversaries appearing before it" (Pet. App. 23a), the Commission now seeks to avoid further judicial clarification and reemphasis of this point by saying to this Court in its Memorandum that it has recognized all along its "positive responsibility to canvass all facets of the public interest . . .," to compare all available alternatives, and to consider whether scenic and recreational values outweigh the advantages of any power development. (Commission Memorandum, pp. 2, 3). Certainly this is in sharp contrast with its assertion before the Court of Appeals that its "primary" responsibility was the development of water power and that a project could not be denied a license "simply because there might conceivably have been alternative methods of generating the needed power."

> ". . . It is, therefore, of doubtful relevance to the present case whether there are practicable alternatives to an appropriate use of water power by which Con Ed could meet its anticipated needs for peaking power with generally comparable economy." (Commission Brief in Court of Appeals, pp. 20-22, 29)

The extent to which the principles of law laid down by the Court of Appeals are actually embraced by the Commission, moreover, is clouded by its continued denial (Memorandum, pp. 2, 4) of the conclusion reached by the Court of Appeals that the record in this case was deficient. For the Commission to say that it accepts the general standards laid down by the Court of Appeals and yet, at the same time, to assert its prior compliance with those standards is to call in question its understanding of the true reach of the Court's opinion. Unless upon review this Court should uphold the Court of Appeals' findings as to the ways in which the record was defective, Scenic Hudson and the Towns are apprehensive that in the remanded proceedings before the

Commission the latter will fail to discharge the full scope of the affirmative duties laid upon it by the Court of Appeals.

There is more at stake here than a mere dispute over the application of the substantial evidence rule, which ordinarily would not afford a basis for review. The Court of Appeals found that there were gaps in the record which the Commission on its own initiative should have filled. If the Commission's position is—as its Memorandum indicates—that it recognizes its duty to fill in gaps but that there were no such gaps to fill in, what assurance is there that in the remanded hearings it will proceed to develop the missing facts on its own initiative in the comprehensive manner called for by the opinion below?

It is imperative that if the remanded hearings are to be in conformity with the Court's opinion, and not to eventuate in further time-consuming and expensive litigation, the scope of the Commission's duties should be clarified on review by affirming specifically wherein the Commission had failed to do its duty in the prior hearings, and what, therefore, it must do in the remanded hearings.

The issues at stake are of high national importance, for on the proper conduct of the remanded hearings will hinge the preservation of the scenic beauty and fish resources of the Hudson River in the vicinity of Storm King, the beauty of the countryside in Westchester and Putnam Counties through which overhead high tension wires are proposed to be constructed, the supply of reliable peaking and reserve power for New York City, and the reduction of air pollution therein.

(2)

The Petition states, among other things, that the "new procedural requirements" laid down by the Court of Appeals "substantially supersede and modify both the sub-

stantial evidence rule and the rules relating to burden of proof which are prescribed by § 7(c) of the Administrative Procedure Act . . ." The Petition further states that these requirements would "throw a cloud on virtually every administrative proceeding . . ." and violate the "express limits" placed on judicial review by Section 10(e) of that Act. (Petition, p. 14).

This allegation, that the construction of the Federal Power Act in the opinion below brings it into conflict with the Administrative Procedure Act, deserves the scrutiny of this Court. It is a contention which, unless put to rest on review, is likely to be raised in future licensing cases in other Circuits by utilities seeking to circumscribe the scope of the Commission's duties and to relegate it, as Consolidated Edison would do, to the role of a mere "umpire".

The conservationist groups comprising Scenic Hudson Preservation Conference are interested not only in the future of the Hudson River Valley but in the preservation of natural beauty and resources generally throughout the country. The Nature Conservancy, for example, is a member of the Conference, and since the issuance of the Court of Appeals decision a number of other national conservationist groups have applied for, and been granted, permission to intervene in the current proceedings as parties, in support of Scenic Hudson's position. These include the National Parks Association, The Izaak Walton League, the National Audubon Society, the Sierra Club and the Wilderness Society. These groups have hailed the opinion of the Court of Appeals as a landmark in the conservation movement. That opinion should be affirmed in strong terms in the interests of removing any uncertainty as to its scope and avoiding litigation in other Circuits where conflicting views of the Commission's duties and of the reach of the Administrative Procedure Act may be taken.

It is respectfully submitted that the petition for certiorari should be granted.

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